FILED
FEB 20 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 06-340, 06-549

IN THE
SUPREME COURT OF THE UNITED STATES

NATIONAL ASSOCIATION OF HOME BUILDERS,
Petitioner,
v.
DEFENDERS OF WILDLIFE, ET AL.
Respondents.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,
v.
DEFENDERS OF WILDLIFE, ET AL.
Respondents.

On Writs Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE THE AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION AND THE NATIONWIDE PUBLIC PROJECTS COALITION IN SUPPORT OF PETITIONERS

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The American Road and Transportation Builders Association and the Nationwide Public Projects Coalition, as *Amici curiae*, respectfully submit this brief in support of Petitioners National Association of Home Builders and U.S. Environmental Protection Agency ("EPA").[1]

INTERESTS OF THE AMICI CURIAE

The *Amici* are private entities, public sector agencies, associations, and local governments that provide essential public services covering transportation, flood control, water supply, and waste water management.

Amici and their member organizations would be hard-hit if the Ninth Circuit decision is affirmed. The ability of *Amici* to timely meet essential public needs could be severely harmed if public agencies must assess the speculative future land use effects of potential development on listed species in order to meet the "insure" mandate under Section 7(a)(2) of the Endangered Species Act ("ESA"), 16 U.S.C. 1531 *et seq.* The implications of upholding the Ninth Circuit would extend far beyond the Clean Water Act ("CWA") National Pollutant Discharge Elimination System ("NPDES"), 33 U.S.C. § 1342, program transfer to Arizona at issue in this case, and will impact federal agency actions necessary for many vital public works projects across the nation.

The *Amici* consist of the following:

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[1] All parties have consented to the filing of this brief. The *Amici* have filed letters of consent with the Clerk. Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party in this case authored this brief in whole or in part, and no person or entity other than the *Amici* and their counsel have made a monetary contribution to the preparation and submission of this brief.

The American Road and Transportation Builders Association ("ARTBA") is made up of more than 5,000 member organizations in the transportation construction industry, including construction contractors; professional engineering firms; federal, state, and local transportation administrators; heavy equipment manufacturers; and materials suppliers. These member companies employ more than 2.5 million people in the transportation construction industry in the United States. ARTBA's members are responsible for construction of vital public infrastructure projects such as highways, bridges, airports, railroads and mass transit facilities.

The Nationwide Public Projects Coalition ("NPPC") is a not-for-profit association that is made up of regional and local government agencies involved in water supply, flood control, irrigation, wastewater and stormwater management, street and highway construction and maintenance, and environmental quality amenities. These agencies represent over 12 million constituents, extending from Connecticut to California, and from Alaska to Georgia. NPPC works on behalf of members of the public to ensure that vital public infrastructure services are provided in a safe, timely and environmentally-beneficial fashion. Consisting of public agencies and firms that provide vital infrastructure and services, NPPC's members must ensure that a responsible balance is achieved between environmental, health, and safety goals and the protection of human lives and property. NPPC members often encounter ESA issues in providing these services. NPPC's members are typified by the following agencies:

1) **The Metropolitan Denver Water Authority** ("MDWA") is a political subdivision and public corporation of the State of Colorado. MDWA is made up of twenty cities and special districts that provide municipal water

and/or wastewater services for the metropolitan Denver area and serve more than 1.5 million persons. MDWA's member agencies serve some of the fastest-growing counties in the nation.

2) **The Consolidated Mutual Water Company** ("CMWC") is mutually owned, and serves an estimated population of 100,000 people in Jefferson County, Colorado, in the western region of Metropolitan Denver. CMWC acquires its water supply from lakes and streams.

3) **Rancho California Water District** ("RCWD") provides water and sewer service over a 150 square mile area in southwestern Riverside County, California. Thousands of residents and businesses rely on RCWD for potable water. The ESA has delayed and driven up costs on numerous capitol improvement projects undertaken by RCWD.

4) **The Cobb County-Marietta Water Authority** ("CCMWA") is a political subdivision of the State of Georgia. CCMWA is a regional water wholesaler that supplies water to municipalities and counties serving more than 780,000 people in the rapidly growing Metro-Atlanta area. Included are all of Cobb County and its municipalities, all of Paulding County, and portions of Douglas County, Cherokee County, and Fulton County.

5) **The West Valley Water District of Rialto, California** ("WVWD") is an independent special district that serves water customers living in southwestern San Bernardino County and northern Riverside County. WVWD depends on local surface water resources, five groundwater basins and the California State Water Project to meet the needs of more than 50,000 persons.

SUMMARY OF ARGUMENT

1) The Ninth Circuit's misapplication of *Public Citizen* with respect to EPA's duty under Section 7(a)(2) of the ESA improperly requires that agency to speculate on future impacts to listed species from development. Because EPA's NPDES authority is limited to the regulation of discharges into navigable waters—not land development—the CWA may not be interpreted to require the Agency to address the potential consequences far removed from its scope of authority in order to meet the "insure" duty under Section 7(a)(2). In essence, the Ninth Circuit's ruling would transform the CWA into a "super land use" control statute to achieve the goals of the ESA. Nothing in this Court's 1978 decision in *TVA v. Hill* allows for such an expansion of an agency's organic authority to further ESA's goals.

2) The Ninth Circuit's adoption of the "but for" test distorts the tort principle of "proximate causation." The Ninth Circuit's rationale would so expand the scope of effects that must be considered under Section 7(a)(2) as to require federal agencies to speculate regarding the unforeseeable consequences of agency actions on local development activities. The effect of the decision would be to undermine the principles of proximate causation endorsed by this Court in *Sweet Home*, *Public Citizen*, and *Metropolitan Edison* with respect to the ESA and NEPA.

3) The Ninth Circuit's rationale, if upheld, will extend far beyond EPA's CWA transfer action at issue in this case. If ESA considerations are found by the Court to expand federal agencies duties beyond the limits of their discretionary authorities, those agencies will be required to speculate as to the impact of future development on the siting of important public projects. The result will be a significant increase in costs and delays for vital projects,

such as much needed highway improvements, that could compromise essential safety and environmental needs.

ARGUMENT

I. THE NINTH CIRCUIT'S ADOPTION OF THE "BUT FOR" CAUSATION TEST INTERPRETING *PUBLIC CITIZEN* WOULD TRANSFORM THE ESA INTO A "SUPER" LAND USE CONTROL LAW.[2]

The Ninth Circuit misapplied *Department of Transportation v. Public Citizen*, 541 U.S. 752, (2004), in concluding that the requirement of Section 7(a)(2) of the ESA for agencies to "insure" that actions do not result in "jeopardy" or "adverse modification of [critical] habitat" makes private land use activity an "effect" of EPA's action to approve Arizona's assumption of the NPDES permit program. This adoption of a "but for" test distorts the *Public Citizen* ruling and elevates the ESA into a "super" land use control statute.

A. The Ninth Circuit's Decision Distorts *Public Citizen*.

This Court in *Public Citizen* squarely and unanimously rejected the "but for" causation test in construing the scope of effects that must be considered under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*. Examining whether NEPA required the Federal Motor Carrier Safety Administration ("FMCSA") to consider the effects of a rule imposing registration and safety

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[2] While the Court certified four questions, and requested all parties to brief a fifth question, this brief addresses only the following question: Did the Ninth Circuit incorrectly apply the holding of *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), in concluding that EPA's approval of Arizona's NPDES permitting program was the legally relevant cause of impacts to endangered species resulting from future private land use activities?

requirements on Mexican domiciled motor carriers operating in the United States, the Court held that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Public Citizen,* 541 U.S. at 770. There, FMCSA did an Environmental Assessment under NEPA focusing on those effects that were "likely to arise from the increase in the number of roadside inspections of Mexican trucks and buses," *id.* at 761, but "did not consider the environmental impact that might be caused by the increased presence of Mexican trucks in the United States." *Id.* at 752. FMCSA concluded that it lacked the discretion to prevent the entry of Mexican trucks into the United States since the decision to allow entry flowed from the President's Executive Order to lift a long-standing moratorium and that of Congress in granting the President such authority while simultaneously limiting FMCSA's discretion. *Id.* at 766. In upholding FMCSA's decision, the Court adopted the "familiar doctrine of proximate cause from tort law" in holding that a "but for" causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations. *Id.* at 767. *See also, Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (NEPA requires "a reasonably close causal relationship" between the environmental effect and the alleged cause).

Here, while the Ninth Circuit correctly recognized the *Public Citizen* principle of "legally sufficient" causation, the court then proceeded to completely misapply that principle in holding that Section 7(a)(2)'s "insure" language imposed a duty on EPA to conduct a far reaching analysis of the impact of development projects on ESA-listed species that may be dependent on state issuance of NPDES permits. "Neither the [U.S. Fish and Wildlife Service, ("FWS")] nor the EPA makes any argument that justifies the Biological

Opinion's failure to analyze, in detail, the likely effect of such future development projects fostered by pollution permits on specific species." *Defenders of Wildlife v. EPA*, 420 F.3d 946, 973 (9th Cir. 2005). By imposing such a requirement, the court essentially mandated EPA to require detailed consideration of how a state's assumption of the 402 NPDES program would become the "catalyst" of a series of land use impacts far removed in time and space from issuance of NPDES permits by the State. EPA would be forced to "crystal ball" land use impacts that may occur in the future such as assessing local development plans for upland projects that have little if any relationship to discharges of pollutants into navigable waters.[3] As we discuss below, this misapplication would especially affect many public works projects such as federally funded highway construction that may facilitate development at some point in the future.

B. ESA Section 7(a)(2) Does Not Authorize the Kind of Deviation from the *Public Citizen* Ruling Adopted by the Ninth Circuit Here.

The Ninth Circuit latches on to the "insure" language of Section 7(a)(2) as creating a substantive duty that required EPA and FWS consultation to consider far-reaching development projects that are "interrelated or interdependent" with the discharge permitted by the permit. *Defenders*, 420 F.3d at 951, 972-973. However, the fact that Congress created a duty on agencies to "insure" against such harm to listed species does not expand the underlying authority of a federal action agency to engage in such analysis. Private land use activities are not "caused" by the

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[3] The states still without NPDES authorization include: Alaska, Idaho, Massachusetts, New Hampshire, and New Mexico. U.S. Envtl. Prot. Agency, State Program Status, *available at* http://cfpub.epa.gov/npdes/statestats.cfm.

EPA decision to transfer the NPDES program to Arizona and therefore cannot be an "effect" of that decision. Moreover, the "substantive/procedural" distinction that the lower court adopts between the ESA and NEPA does not somehow expand the "effects" analysis that EPA may consider in making a transfer decision. When EPA and FWS consult under Section 7 regarding issuance of an NPDES permit, that consultation is limited to effects within the "action area" limited by the water body receiving the discharge and downstream areas—not some unrelated land use activity. *See* 50 C.F.R. § 402.02 ("Action area means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action"). *See also*, *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 512 (10th Cir. 1985)(Corps considered how decreased water flow would hurt the endangered whooping cranes because the agency "is required, under both the Clean Water Act and the Endangered Species Act, to consider the environmental impact of the discharge that it is authorizing").

The principles set forth by the D.C. Circuit regarding EPA's NPDES permitting authority and NEPA are equally applicable to the CWA/ESA interface. The D.C. Circuit squarely held that NEPA does not expand EPA's administration of the NPDES permit program to require regulation of the underlying activity as opposed to the effects of the discharge itself. The court overturned an EPA regulation that would ban the construction of a new industrial source pending issuance of a discharge permit. *Natural Res. Def. Council v. EPA*, 822 F.2d. 104, 128 (D.C. Cir. 1987)("Until the private owner applies for a discharge permit, then, EPA lacks authority to regulate the owner's activities under NEPA and the Clean Water Act. EPA's construction ban thus seems directly contrary to Congress' clear intent, as elucidated by the expressly limited statutory definition of 'major Federal action'"). In a follow-up

decision, the court concluded that "neither the Clean Water Act nor NEPA authorizes EPA's imposition of non-water quality permit conditions." *Natural Res. Def. Council v. EPA*, 859 F.2d. 156 (D.C. Cir. 1988). The court admonished EPA to not use NEPA to "transmogrify its obligation to regulate discharges into a mandate to regulate the plants or facilities themselves. To do so would unjustifiably expand the agency's authority beyond its proper perimeters." *Id.* at 170. The court then noted that "the CWA does not empower the agency to regulate point sources themselves; rather, EPA's jurisdiction under the operative statute is limited to regulating the discharge of pollutants. Thus, just as EPA lacks authority to ban construction of new sources pending permit issuance, so the agency is powerless to impose permit conditions unrelated to the discharge itself." *Id.*

The Ninth Circuit's decision ignores these principles. The court's attempt to distinguish the ESA from NEPA does not provide a basis to expand the factors EPA must consider under CWA Section 402(b) to encompass far-reaching land use impacts of activities permitted under the NPDES permit program. While courts have held that NEPA is essentially a procedural statute[4], Congress did direct federal agencies to strive to achieve certain substantive goals. Section 101 of NEPA requires the federal government to use "all practicable means and measures" to protect environmental values. Sec. 101(a), 42 U.S.C. § 4331(a).[5]

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[4] *See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1978) and *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1980) (NEPA's mandate to the agencies is "essentially procedural").

[5] The other main goal of Section 101 calls for the Federal Government "to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may

(1) fulfill the responsibilities of each generation as trustee of the

Courts have recognized NEPA's goals. *See Concerned about Trident v. Schlesinger*, 400 F. Supp. 454, 480 (D.D.C. 1975) ("Section 101, in effect, sets out specific environmental goals to serve as a set of policies to guide agency action affecting the environment and declares NEPA's basic substantive policies")(internal citations omitted). *See also, Envtl. Def. Fund, Inc. v. U.S. Army Corps of Eng'rs*, 470 F.2d 289, 297 (8th Cir. 1972)("The language of NEPA, as well as its legislative history, make it clear that the Act is more than an environmental full-disclosure law. NEPA was intended to effect substantive changes in decision-making"). These obligations to integrate environmental factors into the decision-making process are no less significant than those imposed by ESA with respect to the responsibilities of federal agencies. Yet, as *Public Citizen* and other cases have recognized, those responsibilities can only be exercised within the limits of an agency's discretion set forth by Congress; any effects analysis must be directly related to an agency's enabling authority.

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environment for succeeding generations;
(2) assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources."

Sec. 101(b), 42 U.S.C. § 4331(b).

Under the Ninth Circuit's interpretation of *Public Citizen*, the reach of an agency's duty to assess indirect effects would become unlimited. The Ninth Circuit's reliance on *TVA v. Hill*, 437 U.S. 153 (1978), to justify such a result is completely misplaced. The effects analysis in *Hill* resulting in the Court's sweeping language that the Section 7 "insure" command "admits of no exceptions" does not in any way justify expanding the express factors in Section 402(b) of the CWA to reach the kind of land use impacts discussed by the court below. *Hill* dealt with the direct effects of the Congressionally authorized Tellico Dam project on the aquatic habitat of the snail darter where the undisputed evidence showed that the completion of that dam would result in jeopardy to that species. The Court recognized the close causal relationship between the construction of the dam on the Tennessee River and the habitat of the snail darter within the river.[6]

The legislative history of the ESA analyzed by the Court at length in *Hill* reveals a key principle: while the Section 7 duties were intended by Congress to be imposed on each federal agency, that duty was not unlimited; agencies would have to exercise that duty within the confines of their underlying authority. As the *Hill* Court noted in quoting from Representative Dingell's comments on the Conference Report, "[Section 7] substantially amplifies the obligation of [federal agencies] to take steps **within their power** to carry out the purposes of this act." *Hill*, 437 U.S. at 183 (emphasis added). That qualifier is essential to understanding the limits of the reach of "effects" that the ESA obligates EPA (and for that matter, any other federal

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[6] "[T]he snail darter apparently lives only in that portion of the Little Tennessee River which would be completely inundated by the reservoir created as a consequence of the Tellico Dam's completion." *Hill*, 437 U.S. at 161.

agency) to address. That limitation has been consistently followed by the FWS in developing regulations governing the Section 7(a)(2) duties of federal agencies. *See, e.g.*, Interagency Cooperation--Endangered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. 19,926, 19,937 (June 3, 1986) (codified at 50 C.F.R. Part 402)("These counterpart regulations would allow individual Federal agencies to 'fine tune' the general consultation framework to reflect their particular program responsibilities and obligations"). Other Circuit Courts have recognized these limits. *See Sierra Club v. Glickman*, 156 F.3d. 606, 616 n.5 (5th Cir. 1998)(the "duty to consult [under Section 7(a)(2)] and the duty to conserve [under Section 7(a)(1)] is tempered by the authorities of each agency"); *Riverside Irrigation Dist.*, 758 F.2d. at 512 (the ESA "does not, by its terms, enlarge the jurisdiction of the Corps of Engineers under the Clean Water Act").

In fact, the record below reflects FWS and EPA's joint understanding that the "effects" analysis for EPA's transfer action under Section 402(b) does not reach the private development activities that may impact upland habitat of listed species within Arizona such as the pygmy owl. The FWS Biological Opinion clearly states that the loss of the Section 7 consultation following Arizona's assumption of the NPDES program will not be the legally sufficient cause of increased development:

> Developments are driven by any number of factors, including but not limited to demand, supply economics, political decisions, zoning regulations and financial market stability. Based upon the best available information, development in the action area will not be caused by EPA's proposed approval . . . We believe that the assumption of the program by

> the State of Arizona will not cause development, and concur that EPA's CWA-mandated approval of the program has only an attenuated causal link to the reduction in Federal ESA conservation responsibilities.

U.S. Fish and Wildlife Service Biological Opinion 21-23 (Dec. 3, 2002), *available at* http://www.fws.gov/southwest/es/arizona/Documents/Biol_Opin/020268_EPA_approval_of_AZ_AZPDES.pdf. This interpretation was further clarified in an exchange of letters between EPA and FWS in October, 2006.[7] FWS's historic interpretation along with its specific application in consulting over the EPA's Section 402(b) actions undermines the Ninth Circuit's rationale that such indirect land use effects must be considered by the agency.

Finally, not only would imposing such a duty exceed the CWA and ESA obligations, it would undermine the "cooperative federalism" inherent in the CWA. The CWA specifically limits the authority of federal agencies to intrude into state and local matters. CWA Section 101(b)("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources"). The Ninth Circuit's reasoning would undermine these federalism principles. EPA would be forced to speculate on the future land use impacts on the habitat of an ESA-listed species from virtually any development that may at some point in the future require a State NPDES permit. This would necessarily require EPA to assess and perhaps override local zoning and planning decisions that may be enabled by such

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[7] The agencies involved with the ESA have now clearly determined that ESA Section 7(a)(2) does not apply to CWA Section 402(b). *See* EPA Pet. App. 93a-102a (App. C), 103a -110a (App. D), 111a – 116a (App. E).

permit decisions. In effect, EPA would become the "land use czar" for any development that may impact a listed species within a state seeking to assume the NPDES program. That result is clearly not what Congress intended when it enacted both the CWA and the ESA.

II. IF UPHELD, THE NINTH CIRCUIT'S RATIONALE WOULD SO EXPAND THE SCOPE OF EFFECTS THAT MUST BE ADDRESSED UNDER SECTION 7(A)(2) OF THE ESA SO AS TO CONFLICT WITH THE PRINCIPLE OF PROXIMATE CAUSATION ENDORSED BY THE SUPREME COURT IN *SWEET HOME*, *PUBLIC CITIZEN*, AND *METROPOLITAN EDISON*.

A. The Tort Principle of Proximate Causation Is Not the Same as Factual Causation.

The Ninth Circuit's adoption of the "but for" test undermines the long standing common law principle of "proximate causation" that has been repeatedly adopted by this Court in construing the scope of effects that must be considered under various federal environmental statutes. "Proximate cause" is the not the same as "but for" factual cause. It is "not about causation at all but about the appropriate scope of responsibility." Dan B. Dobbs, *The Law of Torts* 443 (2000). The lessons from the classic *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339 (1928), illustrate the importance of this legal principle. Every student who has taken Torts 101 knows the *Palsgraf* story: A passenger boarding a train slips; a railroad employee tries to help but causes the passenger to drop a package; the package contained fireworks which exploded with enough force to knock the scales at the other end of the platform down on the unlucky Mrs. Helen Palsgraf. Though she won

her claim for negligent damages in the jury trial, she lost upon appeal: the railroad employee was not liable because his actions were too remote from the final effect. *Palsgraf* epitomizes how one is liable only for the harm or injury that is foreseeable—"the orbit of the danger as disclosed to the eye of reasonable vigilance." *Id.* at 343.

The Ninth Circuit's rationale would stand *Palsgraf* on its head. All federal agencies conducting ESA consultations with the FWS (not just EPA under CWA Section 402(b)), would be responsible for the unforeseeable, undefined future results of their actions on listed species or face liability under the ESA. In effect, an undefined chain of events could increase the scope of the ESA liability for years to come.[8] Public sector agencies represented by your *Amici* and that are responsible for building the nation's infrastructure and transportation systems would find it very difficult to obtain ESA clearance because of the endless, infinite harms that could occur in the distant future, even where those agencies have no control over the decisions that may result in such impacts. Rather, as it has done in the past, this Court should use proximate cause as the controlling limitation on liability. As Judge Andrews said in his well known *Palsgraf* dissent: "What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics." *Palsgraf* at 352 (Andrews, dissenting).[9]

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[8] Section 7 incidental take statements protect federal agencies from Section 9 liability: "any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned." ESA Section 7(o)(2).

[9] In addition to being practical, proximate cause supports justice. As one legal scholar noted:

> The separation of proximately-caused consequences

B. Courts Have Adopted Proximate Causation Principles Under the ESA, Just as They Have Done Under NEPA and the CWA.

This Court has recognized that the ESA does not alter or modify proximate causation principles. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 708 (1995), the Court specifically addressed proximate causation in a facial challenge to the validity of the FWS "harm" regulation, to the extent that it prohibited habitat modification as a taking under Section 9.[10] Justice O'Connor gave two reasons for concurring with the Court's upholding of the FWS's definition of "harm": (1) because it "is limited to significant habitat modification that causes actual, as opposed to hypothetical or speculative, death or injury to identifiable protected animals," *id.* at 708-709; and (2) the regulation's application "is limited by ordinary principles of proximate causation, which introduce notions of foreseeability." *Id.* at 709. Importantly, she saw "no indication that Congress . . . intended to dispense with ordinary principles of proximate causation. Strict liability . . . does not normally mean liability for every consequence,

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> from the broader universe of actually-caused consequences is a policy-driven process that asks whether the resultant harms are so clearly outside the risks [a defendant] created that it would be unjust or at least impractical to impose liability.

Albert C. Lin, *Erosive Interpretation of Environmental Law in the Supreme Court's 2003-2004 Term* (Houston L. Rev., Summer 2005). Using proximate cause thus facilitates or expresses "a value judgment about the appropriate scope of liability . . . ." Dobbs, *supra*, at 447.

[10] The question in *Sweet Home* was whether the FWS's definition of "harm"—including the phrase, "significant habitat modification or degradation where it actually kills or injures wildlife," was facially invalid. *Sweet Home*, 515 U.S. at 687.

however remote, of one's conduct." *Id.* at 712.[11]

Subsequent ESA cases have built on *Sweet Home's* adoption of proximate causation as a limiting factor.[12] In *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife*, 273 F.3d 1229 (9th Cir. 2001), the court found that "it would be unreasonable for the Fish and Wildlife Service to impose conditions on otherwise lawful land use if a take were not reasonably certain to occur as a result of that activity." *Id.* at 1243. *See also, Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997)("when interpreting a term in a statute [like the ESA] which is, like 'cause' here, well-known to the common law, the court is to presume that Congress intended the meaning to be interpreted as in the common law").

Proximate causation has long been an accepted part of NEPA case law in assessing the scope of indirect effects that must be considered by federal agencies. When the *Public Citizen* Court noted that "NEPA requires 'a reasonably close causal relationship' akin to proximate cause in tort law," *Public Citizen*, 541 U.S. at 767, it relied heavily on this Court's previous analysis in *Metropolitan Edison Co.*, 460 U.S. at 775 (the potential of mental anxiety from restarting a nuclear plant "lengthens the causal chain beyond

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[11] Justice O'Connor analyzed *Palila v. Hawaii Department of Land and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988), in terms of proximate causation to determine that it is not a take under ESA to permit mouflon sheep to eat mamane-naio seedlings that, when full grown, might have fed and sheltered endangered palila birds. "Destruction of the seedlings did not proximately cause actual death or injury to identifiable birds; it merely prevented the regeneration of forest land not currently inhabited by actual birds." *Sweet Home*, 515 U.S. at 713-714.

[12] Legal commentators also used proximate cause-like analysis to point out that permitting is not the cause of development, and that land use authorizing agencies are not vicariously liable for Section 9 take. *See* J.B. Ruhl, *State and Local Government Vicarious Liability Under the ESA*, 16 Nat. Res. & Env't 70 (Fall 2001).

the reach of NEPA"). These principles have been adopted by numerous courts over the years. *See e.g., City of Shoreacres v. Waterworth*, 420 F.3d 440, 452 (5th Cir. 2005)("a plaintiff mounting a NEPA challenge must establish that an alleged effect will ensue as a 'proximate cause,' in the sense meant by tort law, of the proposed agency action").

These NEPA decisions have applied such principles in articulating a "rule of reason" standard in assessing the extent of effects that must be considered under that statute. As the D.C. Circuit has stated, "The starting point in any analysis of an agency's compliance with . . . NEPA is the 'rule of reason,' under which a federal agency proposing a major action must consider only the reasonably foreseeable environmental effects of the action." *Potomac Alliance v. U.S. Nuclear Regulatory Comm'n*, 682 F.2d 1030, 1035 (D.C. Cir. 1982).

Courts have particularly applied the principles of proximate causation in limiting the scope of speculative future effects that must be considered under NEPA.[13] For

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[13] *See Kleppe v. Sierra Club*, 427 U.S. 390 (1976)(the mere contemplation of future action was not sufficient to require preparation of an environmental impact statement); *Sierra Club v. Marsh*, 976 F.2d 763, 768 (1st Cir. 1992)("Agencies must consider only those indirect effects that are 'reasonably foreseeable.' They need not consider potential effects that are highly speculative or indefinite"); *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 81 (D.D.C. 2006)("The [NEPA process] must include, among other things, a detailed statement describing the reasonably foreseeable environmental impact[s]")(internal quotations omitted); *Okla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 681 F. Supp. 1470, 1489 (N.D. Okla. 1988)("If, however, the effects cannot be readily ascertained and if the alternatives are deemed remote and only speculative possibilities, detailed discussion of environmental effects is not contemplated under NEPA"); *Fla. Keys Citizens Coalition, Inc. v. U.S. Army Corps of Eng'rs*, 374 F. Supp. 2d 1116, 1151 (S.D. Fla., 2005)("Any attempt to assess the cumulative impacts from such future projects would be pure speculation and is not required").

example, courts have held that NEPA review of federal aid highway projects need not always analyze the environmental effects of future segments that may be connected to the project under review. *Adler v. Lewis*, 675 F.2d 1085, 1096-1097 (9th Cir. 1982)(segmentation is suitable when four factors are met: "(1) the section must be as long as practicable to permit consideration of environmental matters on a broad scope, (2) the section must have independent utility, (3) the length of the highway selected must assure an adequate opportunity for the consideration of alternatives, and (4) the segment should fulfill important state and local needs").[14]

The official highway community, itself, operates with the understanding that it is not responsible for future effects:

> A transportation agency has no legal responsibility or authority to approve or direct the course of development, and usually other local or regulatory entities must take intervening actions before such development could occur. Therefore even when a "but for" relationship exists between a transportation project and development trends, a transportation project may not necessarily be the proximate cause of land use changes, pace or location of development and resultant environmental impacts. For a transportation project that has economic development as part of the project purpose, the causal relationship is made closer as a matter of policy, and land

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[14] *See also, Ctr. for Biological Diversity v. Fed. Highway Admin.*, 490 F. Supp. 2d 1175, 1190 (S.D. Cal. 2007)(three private development projects that were conditioned on a proposed federal project are not subject to federal NEPA requirements).

> use changes or future development may be considered as indirect impacts of the project.

Am. Ass'n of State Highway and Transp. Officials, *Indirect and Cumulative Impact Analysis* 19-20 (Jan. 2006), *available at* http://www.trb.org/NotesDocs/25-25(11)_FR.pdf. This same report reflects on the "tenuous" causal relationship between a transportation project and any resulting land use changes or increased development: "A complex interplay of intervening public and private actions must occur before development takes place; variables other than transportation, such as market demand, site suitability, capital availability, market feasibility, and regulatory controls, play a significant role in making development decisions." *Id.* at 20.[15]

C. Proximate Causation Principles Under ESA and NEPA are Equally Applicable to the ESA/CWA Interface.

The body of ESA and NEPA law adopting proximate causation principles is equally applicable to the ESA/CWA interface at issue in this case. There is no rational basis to justify the Ninth's Circuit's reliance on Section 7(a)(2)'s "insure" language to justify deviating from these principles when the *Sweet Home* Court clearly found that "proximate causation" provided a limitation in assessing Section 9 "take" liability under the FWS's "harm" definition regarding habitat modification. Section 7(a)(2)'s direction that the agency action should "insure" not to cause "jeopardy" or "adverse modification" of critical habitat, is no less important than Section 9's direction that agency action not cause a take of a

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[15] Indeed, connecting NEPA to the future effects of our nation's infrastructure is ultimately a policy decision. *Public Citizen*, 541 U.S. at 767 ("proximate cause analysis turns on policy considerations and considerations of the 'legal responsibility' of actors").

listed species. In fact, in the 1982 amendments, Congress expressly linked the two sections by creating an "incidental take" exception following Section 7 consultations and the development of "reasonable and prudent alternatives" in a FWS Biological Opinion. *See* ESA Section 7(b)(4)(iv).[16]

Indeed, just as there is no basis for deviating from these principles under the ESA, there is similarly no basis under the CWA. Courts have found that "limiting effects analysis" is consonant with its statutory language. In addition to the two National Resources Defense Council cases cited earlier, recent case law holds that the CWA "gives the EPA jurisdiction to regulate and control only *actual* discharges—not potential discharges, and certainly not point sources themselves." *Water Keeper Alliance v. EPA*, 399 F.3d. 486, 505 (2d Cir. 2005).[17] *Water Keeper Alliance* supports *Amici's* reading that Congress did not intend Section 402 of the CWA to expand a permit agency's authority to make the issuance of NPDES permits by the state the "proximate cause" of private land use activity. Because EPA's NPDES program is primarily concerned with discharge permits—not future road building or land development—the CWA does not require the agency to

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[16] "Provision for incidental take permits exempting landowners from Section 9 was added to the ESA in order to give landowners not requiring federal permits the same opportunity to develop their property as those proceeding under Section 7." Robert Meltz, Congressional Research Service, *The Endangered Species Act and Private Property: A Legal Primer*, n.19 (Mar. 7, 1993), quoting House Conf. Rep. No. 304, 97th Cong., 2d Sess., *reprinted in* [1982] U.S. Code Cong. & Ad. News 2860, 2870.

[17] Professor Lin, *supra* note 9, also commented that this Court, in a case regarding pollution of the Florida Everglades, "hinted at a role for tort causation" in allowing two arguments for consideration on remand (the Government's "unitary waters" argument, and the water district's "indistinguishable parts of the same water body" theory). Albert Lin at 614-15, citing *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004).

address potential consequences far removed from its scope of authority.

Clearly, the required cause-and-effect relationship between NPDES program approval, endangered species, and future development is simply lacking. For this Court to uphold the Ninth Circuit's decision based solely on some vision of what might happen in the future—something unrelated to EPA's 402(b) authority—would violate the *Sweet Home*, *Public Citizen*, and *Metropolitan Edison* principles. Since EPA cannot regulate land use activities including public works projects of your *Amici*—fundamentally state and local issues—the Ninth Circuit's decision expands the CWA without Congressional approval. Whatever tenuous link the 9th Circuit found between NPDES program approval and Section 7(a)(2) jeopardy, if any, is beyond the CWA and should therefore be rejected.

III. THE NINTH CIRCUIT'S RATIONALE, IF UPHELD, WILL EXTEND FAR BEYOND THE CWA ACTION AT ISSUE IN THE CASE AND WOULD HAVE SIGNIFICANT ADVERSE EFFECTS ON VITAL PUBLIC PROJECTS.

The ramifications of the Ninth Circuit's interpretation of the scope of Section 7(a)(2) consultation are significant. The Ninth Circuit's decision could severely impact the process of decision-making for many vital projects sponsored by your *Amici* by elevating ESA considerations above other factors that must be considered in the review of public works projects. The transportation planning process in which ARTBA and NPPC members must participate typifies these consequences. Regulatory and administrative efforts required by ESA regulations account for a significant part of the delays faced by transportation projects.

For example, ARTBA member projects in California have recently been delayed more than two years due to ESA concerns over the San Bernardino Kangaroo Rat. If the Ninth Circuit's reasoning is allowed to stand, the scope of the ESA will be greatly broadened. The statute will, in effect, become a "trump card" in relation to other environmental requirements of the transportation planning process. ESA considerations will have to be not only examined in terms of transportation construction projects, but also any future development that may be linked in the future to those projects. This type of prediction would be impossible to measure. As a result, transportation projects could face a substantial increase in ESA-related delays because planners would not be able to forecast indirect impacts to species caused by their projects.

According to a recent report by the U.S. Government Accountability Office ("GAO")[18], as many as 200 major steps are already involved in developing a transportation project. According to the same report, it typically takes between nine and 19 years to plan, gain approval of, and construct a new major federally funded highway project.[19] This process involves dozens of overlapping state and federal laws, including ESA implementation, NEPA, state NEPA equivalents, wetland permits, clean air conformity, etc. Often times these procedures mask disparate agendas or, at a minimum, demonstrate an institutional lack of interagency coordination that results in a seemingly endless string of delays.

A recent study by the U.S. Federal Highway Administration ("FHWA") found the time required to process environmental documents for large projects has

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[18] *GAO Testimony Before the Committee on Environment and Public Works, U.S. Senate*, GAO-02-1067T (Sept. 19, 2002).

[19] *Id.*

doubled over the past two decades.[20] In the 1970s, the average time for completion of an environmental impact statement ("EIS") was 2.2 years. Former U.S. DOT Assistant Secretary for Policy Emil Frankel recently reported that from 1999-2001 the median time for completing an EIS was 4.4 years.[21] However, delays in the transportation project environmental review and approval process are not only limited to large projects. According to FHWA, three percent of federally funded transportation improvement projects require an EIS; the remaining 97 percent require an environmental assessment ("EA")(6.5 percent) or a categorical exclusion ("CE")(90.6 percent).[22] A recent report conducted by the National Cooperative Highway Research Program stated:

> [D]elays in completing [EA and CE] reviews are encountered frequently despite the minimal environmental impacts associated with such projects. Even if such project-level delays are individually small, their cumulative impact may be significant because most transportation projects are processed as CEs or EAs.[23]

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[20] U.S. Fed. Highway Admin., *Evaluating the Performance of Environmental Streamlining Development of a NEPA Baseline for Measuring Continuous Performance, available at* http://www.environment.fhwa.dot.gov/strmlng/baseline/section2.asp.

[21] Emil H. Frankel, Asst. Sec'y for Transp. Policy, U.S. Dep't of Transp., Statement Before the U.S. Senate Comm. on Env't and Pub. Works, Hearing on Project Delivery and Envtl. Stewardship (Sept. 19, 2002).

[22] U.S. Fed. Highway Admin. Report to Congress on Federal Highway Administration Streamlining Activities in 2003 (June 2004), *available at* http://www.environment.fhwa.dot.gov/strmlng/rtc0604rpt.asp.

[23] *Environmental Streamlining: A Report on Delays Associated with the Categorical Exclusion & Environmental Assessment Process*, Prepared for the AASHTO Standing Committee on Highways by TransTech Management under NCHRP contract number HR 20-7(129) (Oct. 2000).

According to the above report, 63 percent of all state DOTs responding to the survey reported environmental process delays with preparation of CEs, and 81 percent reported similar delays involving EAs.[24] These delays triple average environmental review times for CEs—from about eight months to just under two years—and have more than doubled review times for EAs, from under 1.5 years to about 3.5 years.[25]

A prime example of the hurdles caused by complex regulation can be found in the case of U.S. 95 in Las Vegas, Nevada. This project involved widening an interstate highway from six to ten lanes. The project had already satisfied all of the necessary NEPA requirements and was under construction. However, a supplemental NEPA document was allowed to be introduced (a single air quality monitoring study modeled in Los Angeles, not Las Vegas) two years after the Record of Decision had been issued. This resulted in a nearly year-long work stoppage. Indeed, although these delays were caused by NEPA, had an ESA-listed species been impacted, the Ninth Circuit's reasoning that Section 7(a)(2)'s "insure" language elevated the ESA above other requirements would have most certainly led to even greater delays by requiring consideration of future speculative land use effects on listed species.

These potential consequences are best understood in light of the safety and environmental needs to be met by the U.S. 95 project. In the year 2002 alone, traffic congestion cost Las Vegas area residents and businesses $364 million and resulted in the additional consumption of 33 million gallons of motor fuel.[26] The segment of U.S. 95 at issue in

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[24] *Id.*

[25] *Id.*

[26] Texas Transportation Institute, 2004 Urban Mobility Report,

this case serviced and accessed some of the fastest growing neighborhoods in Las Vegas. An estimated 190,000 vehicles traveled through the portion of U.S. 95 to be widened each day, with peak hour traffic reaching as high as 11,900 vehicles.[27] Traffic congestion slowed commuters to one-half of the 55 mile-per-hour speed limit on the corridor.[28] Also, between 2000 and 2002 there were 3,535 motor vehicle crashes on one section of U.S. 95.[29] In its present state, the U.S. 95/I-95 interchange in Las Vegas has been rated as one of the 25 "worst bottlenecks" in the United States.[30] The improvements that make up the U.S. 95 widening project are needed in order to keep pace with the rapid population growth currently being experienced in the Las Vegas area and prevent the effects of traffic congestion from worsening.

The widening of U.S. 95, once completed, will lead to enormous environmental, public health and safety benefits. Once finished, the improvement of U.S. 95 will result in a significant reduction in so-called "greenhouse gasses." Specifically, there will be a 58.8 ton reduction in carbon monoxide emissions, a 54.3 ton reduction in volatile organic compounds, and an 87.8 ton reduction in carbon dioxide emissions between now and the year 2025.[31] Further, it is estimated that within that time span there will be an 87.8% reduction in motor fuel usage by U.S. 95 commuters, which translates to 231,654,731 gallons of motor fuel saved (or 68.9 gallons per commuter over the life of the project).[32] Also, the time Las Vegas commuters spend stuck

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Performance Measure Survey for Las Vegas, 2 (Sept. 2004).

[27] U.S. Fed. Highway Admin., Press Release, Sept. 30, 2004.

[28] *Id.*

[29] *Id.*

[30] Cambridge Systematics, Inc., *Unclogging America's Arteries, Effective Relief for Highway Bottlenecks* - study conducted for American Highway Users Alliance, 3 (Feb. 2004).

[31] *Id.* at 63.

[32] *Id.*

in traffic will decrease by an average of 86.5%, which for commuters who use U.S. 95 twice per day, would mean 30 minutes of time saved daily while driving through the area to be improved.[33] Finally, the U.S. 95 improvements are projected to result in 3,524 fewer total motor vehicle crashes, 14 fewer fatalities, and 1,730 fewer injuries to commuters through 2025.[34]

These examples demonstrate the types of problems caused by delaying transportation and other public works projects. These problems will only be exacerbated if the Ninth Circuit's reasoning is allowed to stand and the ESA's "insure" language transforms the already extensive and time consuming review process into a requirement to treat ESA goals above all other considerations. Planners will be forced to account for effects on species that they have no feasible way of being able to project. The ESA will become the driving force behind a review process driven more by speculation over future land use impacts on species habitat than scientific certainty governed by reason.

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[33] *Id.*

[34] *Id.* at 62. Delays in the environmental review and approval process for transportation improvement projects can have tragic consequences. According to the U.S. DOT, more than 42,000 people are killed each year on the nation's highways. U.S. Fed. Highway Admin., *Public Roads* (May/June 2003), *available at* http://www.tfhrc.gov/pubrds/03may/02.htm.

CONCLUSION

The *Amici* ARTBA and NPPC respectfully request this Court to reverse the Ninth Circuit's ruling in *Defenders of Wildlife*.

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